No. 12946.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,
Appellant,

vs.

MANDEVILLE ISLAND FARMS, INC., a corporation, ROSCOE C. ZUCKERMAN and G. K. EVANS,
Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

A study of appellees' brief in conjunction with a consideration of the points raised by appellant in its opening brief, indicates that the fundamental questions presented for decision by this Court are the following:

1. Did or did not the Supreme Court, in its decision in the earlier *Mandeville* appeal, 334 U. S. 219, hold that a complaint states a cause of action under the Sherman Act even though no (substantial economic) effect upon interstate commerce is alleged? (And when we say interstate commerce, so far as this appeal is concerned, we mean *sugar,* for here "the only interstate trade was in sugar": 334 U. S. 246.)

As to this first question, we will show that the Supreme Court actually *stressed* the necessity of alleging those effects upon interstate commerce which the Sherman Act condemns; and that its pronouncement as to the immateriality of the elision of the allegation charging restraints upon sugar (originally contained in Paragraph XI of the

Mandeville complaint) was predicated upon the proposition that interstate restraints were adequately charged elsewhere. ("There was more than enough without it": 334 U. S. 245, footnote 24.)

2. In order to warrant a recovery under the Sherman Act, must or must not the plaintiff allege and *prove* and the trial court *find,* that the activities complained of had a substantial economic effect upon interstate commerce?

Appellees tacitly concede that this question should be answered in the affirmative by their zeal in claiming that a misplaced finding of fact in this regard found its way into the conclusions of law at the solicitation of appellant; a contention which is adequately belied by the very pages of the record which they cite in its support. [R. 242-243.]

3. Did or did not the District Court refuse to find as to the issue of effect upon interstate commerce and clearly indicate that if it had made a finding, it would have been that the activities complained of did not affect interstate commerce?

Appellees have significantly evaded any discussion of this question.

4. Did or did not the District Court err in its application of the measure of damages to the facts of this case?

The solution of this question depends upon whether or not the evidence showed any disqualifying factor with reference to the single net figures for the critical crop years, 1939, 1940 and 1941 which would prevent their being used as the norm or standard from which to admeasure the amount of damage sustained by plaintiffs. (See, in this regard, the computations set out at page 29 of Appellant's Opening Brief.)

We now turn to a discussion of the foregoing questions.

I.

The Supreme Court Did Not Hold, in Its Decision on the Earlier Appeal in the Mandeville Case, That a Complaint States a Cause of Action Under the Sherman Act Even Though No (Substantial Economic) Effect Upon Interstate Commerce Is Alleged.

The following quotations from the majority opinion of the Supreme Court on the former appeal afford a complete answer to appellees' contention that the Supreme Court passed upon the complaint from the standpoint of a pleading charging, *without* more, a restraint as to a farm product which never crossed state lines in its original, unprocessed form:

> "We turn then to consider the questions posed upon the amended complaint that are relevant under the presently controlling criteria. These are whether the allegations disclose a restraint and monopolistic practices of the types outlawed by the Sherman Act; *whether, if so, those acts are shown to produce the forbidden effects upon commerce;** and whether the effects create injury for which recovery of treble damages by the petitioners is authorized." (334 U. S. at p. 235.)
>
> ". . . Again, as we have said, *the vital thing is the effect on commerce,* not the precise point at which the restraint occurs . . ." (334 U. S. at p. 238.)
>
> * * * * * * * *
>
> "Little more remains to be said concerning the amended complaint. *The allegations comprehend all that we have set forth.* We do not stop to restate them, leaving their substance at this point for reference to the summary made at the beginning of this opinion.

*Emphasis here, as elsewhere, is supplied unless otherwise noted.

"Respondent has presented its argument *as if the amended complaint omitted all reference to restraint or effects upon interstate trade in sugar* and confined these allegations to the trade in beets." (334 U. S. at pp. 244-245.)

* * * * * * * *

". . . The amendment did not eliminate or affect numerous other allegations *which in effect repeated the charge in various forms and with reference to various specific effects upon interstate as well as local phases of the commerce.* Some of these explicitly specified trade or commerce in sugar, *others designated the trade affected as interstate, which on the facts could mean only sugar.* Moreover, petitioners deny the disavowal, both in intent and in effect. *They say the elision* was insubstantial, since in the clause from which it was made the allegation of conspiracy to monopolize and restrain interstate commerce remained, and the only interstate trade was in sugar.* We think the amendment for whatever reason made, was not effective to constitute a disavowal, disclaimer or waiver.

"The allegations are comprehensive and, for the greater part, specific, concerning *both the restraints and their effects.* They clearly state a cause of action under the Sherman Act." (334 U. S. at p. 246; footnotes omitted.)

The short of it is that the Supreme Court clearly held that the amended complaint did allege that the activities complained of had that effect upon interstate commerce which the Sherman Act condemns.

After the coming down of the mandate on the appeal, appellant answered, putting the allegations as to inter-

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*Of the allegation originally charging a restraint as to *sugar* and sugar beets. [Complaint, Par. XI, R. 11.]

state effects directly in issue. The burden then devolved upon appellees to prove these allegations if they could. That they failed to do so is made evident from the fact that for this very reason, the District Court refused to make any finding whatever as to this pivotal issue. [R. 810, 811, 812.]

II.

In Order to Warrant a Recovery Under the Sherman Act, the Plaintiff Must Allege and Prove, and the Trial Court Find, That the Activities Complained of Had a Substantial Economic Effect Upon Interstate Commerce.

III.

The District Court Refused to Find as to the Issue of Effect Upon Interstate Commerce and Clearly Indicated That if It Had Made a Finding, It Would Have Been That the Activities Complained of Did Not Affect Interstate Commerce.

The above proposition II was discussed in appellant's opening brief at pages 16 to 19, and it is not seriously disputed by appellees. They claim, however, that Conclusion of Law No. 3 [R. 270; Appellees' Brief 18, Supp. thereto 48-49], is, in effect, a misplaced finding of fact which found its way into the conclusions of law *at the instance of appellant*. In support of this assertion they cite R. 242-243, a reference to defendant's (appellant's) objections to the second draft of plaintiff's proposed findings of fact, conclusions of law and judgment. Recourse to said objections will reveal the utter baselessness of appellees' claims in this regard. We quote from the portions of such draft material to this discussion:

> "Defendant further objects to said second draft of findings upon the ground that the same is replete with conclusions and surplusage, does not correctly

reflect the case as actually tried, and does not comply with the instructions heretofore given by the Court with reference to its preparation. In this connection defendant respectfully suggests that *in order to correctly reflect the holding of the Court,* the findings herein, the conclusions of law and the judgment to be rendered should in substance embrace the following, and that any other matters are pure surplusage and relate to matters not actually tried:

* * * * * * * *

"7. A conclusion of law to the effect that this Court regards the holding of the Supreme Court on the previous appeal binding upon it as the law of the case and *for this reason* concludes that the activities found had a substantial effect upon interstate commerce and hence comes within the purview of the Anti-Trust laws.

"8. *A conclusion of law to the effect that this Court is unable to find, from the evidence, that the activities found had any effect upon the price, supply or competitive conditions with reference to sugar.*" [R. 241-243.]

We thus perceive that appellant's suggestions were made in order to correctly reflect the holding of the District Court, which was that he did not believe that any effect upon interstate commerce had been shown. As the District Judge himself said on motion to amend the findings:

"The Court: I felt that the conspiracy between the refineries had as its real objective the control of the growers and to prevent them from dealing with the refineries that he may have wanted to deal with. In other words, that it more or less limited the grower to the place where he could sell beets and prevented any competition in that respect; but *I didn't feel that it had any effect upon the price of sugar in interstate*

commerce. That is the reason I put everything in my conclusions of law. . . ." [R. 810.]

"The Court: . . . *You will remember I cut out interstate commerce wherever I could find it.*

Mr. Arndt: That was on the basis, as I understood it, that it was a conclusion and not a statement of fact.

The Court: *I am not making a finding of fact. If I had made a finding at all I would have made a finding that it did not affect interstate commerce, but I wouldn't do that in view of the Supreme Court's decision.*" [R. 811.]

The following colloquy, which took place at the hearing of the motion in question, not only showed misgivings on the part of counsel for appellant which are fully justified by the present contentions of appellees, but also further evidences the intention of the Court to make no finding at all on the subject of interstate effects:

"Mr. Works: I think I have been very patient throughout this whole case, but Your Honor will recall we were ensnared on that first appeal by a situation where we understood and I think Your Honor understood—I know I did, that all that was alleged in that complaint—

The Court: Where I made a mistake was not trying the case first.

Mr. Works: That is true.

The Court: I thought I was doing you a favor but instead I have made a lot of extra work.

Mr. Works: I certainly don't want the same situation to happen on this forthcoming appeal that happened on the last one. *If this* is left in here there will*

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*A finding, apparently inadvertent, implying a lack of competition as to sugar interstate. It was stricken on motion of appellant. [R. 274-276.]

be an argument that Your Honor found there was a restraint of competition upon sugar, the interstate product, precisely the same thing that the Supreme Court was dealing with on the first appeal. I don't want to get caught off base again.

The Court: *I wouldn't be surprised if the court sends this case back for a specific finding of fact on the sugar, but I have felt I should not do that in view of the Supreme Court's decision."* [R. 812.]

The result is that appellees' contention that Conclusion of Law No. 3 is in reality a misplaced finding of fact on the vital issue of interstate effects, and as such made at the instance of appellant, is wholly belied by the record.

It follows further, as pointed out in appellant's opening brief, that since the District Court refused to find as to this key issue, the Court's judgment against appellant is without support from the findings and hence is not an appropriate judgment to be entered on the findings which were made, within the meaning of Rule 52 of the Federal Rules of Civil Procedure.

Counsel have not been lacking in vituperative zeal in the preparation of their appellees' brief. The fact, however, that they wholly evade any discussion whatever as to the District Court's point blank refusal to find on the issue of interstate effects amounts to a confession, without avoidance, that they have no answer to the proposition that the findings as made do not support the judgment. If there was no substantial economic effect upon interstate commerce (and the District Court *intentionally* omitted to find as to this issue), the judgment of Sherman Act violation cannot stand.

IV.

The District Court Erred in Its Application of the Measure of Damages to the Facts of These Cases.

Appellees make the point, but do not stress it, that the question of *excessive* damages cannot be raised for the first time on appeal unless a motion for new trial upon that ground has been presented to the trial court.

That question, however, is not here present. The claim is, not that the damages were excessive as such, or appeared to have been awarded as a result of passion and prejudice or the like, but rather that the Court applied the wrong *measure* of damages. This is a question of law and as such reviewable by direct appeal from the judgment, under the plain language of 28 U. S. C., Sec. 2106. Even under the former appellate practice, questions relating to the proper measure of damages were reviewable on writ of error. See, for instance, *Baltimore & Ohio C. Terminal R. Co. v. Becker Milling Machine Co.* (7 Cir.), 272 Fed. 933.

In appellant's opening brief it was argued that the proper measure of damages, translated to the facts of these cases, is the difference, trebled, between what appellees would have received had they been paid on the single net method of settlement in use before and after 1939, 1940 and 1941, over what they actually did receive under the joint settlement method actually in use in those years; *unless* appellees proved that the single net figures for those years were in some way tainted by the effects of the conspiracy.

And in this regard it will be recalled that the Supreme Court declared that the effect of the joint net method was to deprive the growers of the price (the sugar price factor

in this beet price determination formula) the individual refiner received. (334 U. S. at p. 242.) The evidence wholly fails to show that they were deprived of anything more than this.

It thus follows that the ultimate fact which the District Court was called upon to determine was the value of what appellees were deprived of by the acts of the combination; namely, *settlement on the basis of appellant's own net return from sugar,* rather than on the basis of the joint net returns of the three companies.

A similar situation was present in *Baltimore & O. C. T. R. Co. v. Becker Milling Mach. Co., supra.* The Court there said:

> "Plaintiff was given judgment for $4,010 for each machine. From evidence of demand for the machines and numerous sales by the aforesaid 'manufacturers' agents' at that unvarying price, fixed by plaintiff, the court found that such was their 'market value.' And now plaintiff contends that the judgment is unassailable because such finding of fact was not properly questioned, and because, even if it had been, it is supported by the undisputed evidence. True, the finding of 'market value' based on sales as aforesaid must stand; but the ultimate fact for the court to find as the only legal basis of recovery was the amount of money that would make plaintiff whole for the destruction of the machines. And if the uniform price that users were paying to the 'manufacturers' agents' for plaintiff's machines was not the true measure of plaintiff's loss, defendant's objections to the adoption of that standard must be considered." (272 Fed. at p. 935.)

The problem, then, so far as appellees' damages are concerned, is evaluating what they lost: settlement on the

single net method. And, by *stipulation,* appellant's single net returns for each of the three critical years were placed in evidence. These were the figures upon the basis of which settlement would have been made with appellees, unless it be shown (and, as we pointed out in appellant's opening brief, *no such showing was made*) that they were in some way tainted by the activities of the combination.

Appellees, in their present brief, expend considerable rhetoric in attempting to show that appellant's single net figures were "tainted" and "unreliable." We adopt their numbering. (Br. pp. 75-76.)

1. It is said that defendant's figures were "tainted" and "unreliable" because an inextricable part and parcel of an illegal conspiracy. Bearing in mind that the figures we are now talking about are appellant's *individual* sugar net returns (*not* the joint net figures actually used during the three critical years), there was no evidence at all that *those* figures were in any way affected by the conspiracy. In fact the situation was quite the reverse, for, as the District Court held, the sole result of the conspiracy was to effect the substitution of the joint for the individual figures. And, moreover, it should not be lost sight of, insofar as the reliability of the individual net returns were concerned, that the figures were *stipulated* to by all parties, including appellees. [R. 344.]

2. *The charge of failure to produce officers.* It is said that this "failure" requires an inference that every part of the "deal" (whatever that means) was unreliable.

In the first place, this charge is purely atmospheric, not to say disingenuous. Appellees took the depositions of everyone connected with the appellant who could possibly have had anything to do with the matter: W. N.

Wilds, President, R. 464, 469; H. E. Zitkowski, former Vice President, R. 366; E. E. Merrill, auditor, R. 442; R. H. Graham, Tax Department manager and former auditor, R. 456; W. E. Kraybill, Secretary and Treasurer, R. 495; J. A. Summerton, Vice President and Comptroller, R. 497; M. W. Hardy, Western Sales Manager, deposition R. 418, trial R. 714; J. B. Hayden, Eastern Sales Manager and subsequently Executive Vice President, deposition R. 498, trial 681; L. J. Holmes, Clarksburg factory manager, deposition R. 401, trial R. 656; which excludes C. K. Boettcher, the chairman of the Board, not shown to have had any connection with the matter, and who was in Europe. Their testimony was therefore evidence in the case, irrespective of who called them.

This and kindred animadversions on this so-called failure to call witnesses results from a misuse by appellees of the holding of the Supreme Court in the case of *Interstate Circuit v. U. S.,* 306 U. S. 208 (cited at pp. 37, 39, 47, 53, 54, 58, 59 of appellees' brief). That case holds that where the fact in issue is the existence or non-existence of the combination charged, and the proof supports an inference of such concert of action, the failure to call witnesses to deny the concerted action is in itself evidence of agreement.

The misuse by appellees of this doctrine in the present case lies in the fact that in its answers to the interrogatories and at the trial appellant *conceded* the existence of concerted action in the utilization of the joint net method of settlement with the beet growers. Appellant's answer to Interrogatory No. 87 [R. 780-781] admitted that the change to the joint net method of settlement "was made

with consultation, discussion or conference by Crystal with the other manufacturers of sugar in California north of the 36th parallel." And at the opening of the trial, counsel for appellant stated:

> "Mr. Works: I am going to be frank about that, Your Honor. I think we cannot dispute the proposition that Your Honor right now has a right to infer from these cropping contracts that there had been a combination or an agreement between the three manufacturers to use a joint or common or multiple price determination factor in arriving at the price of sugar beets." [R. 317-318.]

It will thus be perceived that appellant actually went to trial as to only two issues: (1) did the concert of action as to the beet prices have a substantial economic effect on interstate commerce (as to which the District Court intentionally omitted to make a finding) and (2) if so, what was the proper measure and amount of damages?

There was thus no reason for appellant to call any witnesses as to any issues other than these. There was certainly no occasion for appellant to call witnesses to deny the existence of a combination whose existence was conceded, and at that point the principle of the *Interstate Circuit* case ceased to have any application.

As for the *reasons* for the change, the Court was given, and accepted that of the President, W. N. Wilds. [R. 473, 810.] It declared it unsatisfactory as amounting to a stifling of competition as regards the freedom of selectivity of the beet growers; a proposition with which counsel for appellant did not disagree. [R. 731-732.]

The plain fact is that this charge of failure to produce witnesses is nothing more than an attempt by appellees to

lift themselves by their own bootstraps and thus to gloss over their failure to prove their case.

3. *The Zitkowski letter and appellees' attempts to enlarge the scope of the "conspiracy."* Appellees' arguments in this regard are contrary to the Court's findings, which were wholly directed to the price fixing of sugar *beets,* as distinguished from restraints as regards the *sugar.* [Finding 9, R. 259.] That the trial court took no stock in appellees' theories along this line is also made evident by the remarks of the District Judge, which we have heretofore quoted:

> ". . . I didn't feel that it had any effect upon the price of sugar in interstate commerce. That is the reason I put everything in my conclusions of law. . . ." [R. 810.]

4. *The evidence as to freight rates and profits.* Appellees' arguments by way of comparison as between the returns to the growers and the overall profits of appellant are nothing if not fantastic. Their barefaced and wholly unsupported assertion (Br. pp. 76-77) that appellant made over $4,000,000 from the conspiracy is equally so.

During the period in question appellant operated beet sugar factories not only at Clarksburg, but also at Oxnard, California [R. 215]; Missoula, Montana [R. 216]; Rocky Ford, Colorado [R. 217]; Grand Island, Nebraska [R. 218]; Mason City, Iowa [R. 219]; Chaska, Minnesota [R. 220], and East Grand Forks, Minnesota [R. 221]. In addition to this, the company sold beet pulp molasses, by-products of the manufacture of sugar. [R. 416, 421.]

We cannot but marvel at the recklessness of an imagination which assumes, wholly without evidence, that

the total overall profits* of a company which, among other things operated *eight* plants ranging from Oxnard and Clarksburg, California, to Chaska and East Grand Forks, Minnesota, were attributable to the utilization of a joint net mode of settlement with the growers at Clarksburg in 1939, 1940 and 1941.

This obsession of appellees with reference to the matter of overall profits results from a studied distortion of the terms "50-50" and "profit sharing" as between the company and the grower at a given factory.

What the grower shared in, both as a matter of contract and of custom in his relationship with the processor, was not the overall profits of the company from all sources and from all plants, but in the net return from sugar sold during a given crop year from the particular factory with which he dealt, according to the percentage sugar content of his beets. [See, Finding 8, R. 258; and see also, R. 406 and sugar table set forth at R. 76.] And it is of course obvious that profit or loss resulting from the manufacturing process itself, as distinguished from sales of sugar, had nothing to do with the calculation of the price to be paid for beets under the price schedules contained in the contracts. *The grower stood no part of the cost of manufacturing the sugar.* [R. 426, 637-638.]

As for the freight costs of sugar during the critical years, we certainly know what they were (Appendix, Appellant's Op. Br.), but there was not a shred of *evidence* to show that fluctuations in them were brought about by

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*Reflected in increased over-all *volume* of sales [R. 215-221, 686] resulting from lifting of quotas by the Government and from other market conditions which, at the same time, had a tendency to lower the *price* to the consumer. [R. 693-694.]

concerted action. On the other hand, appellant did prove, as was pointed out in its opening brief, that the increased freight costs were due to natural competitive conditions. [Appellant's Op. Br. pp. 27-28; R. 685-707, 716-720.] The evidence was undisputed that during the three years in question there was an abnormal supply of sugar in the Clarksburg area, resulting in heavy shipments to distant areas, with freight costs increased thereby [R. 685-687], all of which the trial court clearly understood. [R. 653-702.]

In a word, the record reveals that appellant brought itself squarely within the exception provided in *Bigelow v. RKO Pictures, Inc.*, 327 U. S. 251, 264, that declines in price, profits and values, *not shown to be attributable to other causes*, may, in a proper case, be attributed to the defendant's wrongful acts. Here, appellees did not offer any proof whatever in support of their claim [R. 424, 426-427] that appellant's freight costs were increased as a result of the "conspiracy." In addition to this, appellant did show that the freight cost factor in the sugar net receipts computation *were attributable to other causes* within the meaning of the *Bigelow* case.

And, in this connection, it is worthy of note that appellees (Br. p. 76) do not even claim to have attacked any of the other items going to make up the individual sugar net returns for 1939, 1940 and 1941. (All as shown in the appendix to appellant's opening brief.) They say they were not called upon to do so, and that they made out a *prima facie* case of damages. They refuse to face the fact, however, that the evidence showed nothing tending to impeach the stipulated individual net figures. Their *prima facie* and *ultimate* case, as to dam-

ages, was thus the difference, trebled, between what they were paid under the joint net over what they would have received under the single net method in use before and after 1939, 1940 and 1941. After all, the question for decision in this regard is what appellees would have received but for the "conspiracy"; and as to this, under the evidence in the record, there can be but one answer: *payment on the individual or single net basis.*

5. Appellees cite *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U. S. 555, 561, to the point that the natural and probable effect of the combination would be to destroy normal (beet) prices. This may be true; but the question here is, to what extent?

The claim is also made that it was not necessary for appellees to show that appellant's individual net for the critical years was tainted or rendered unreliable by the concerted action, since the individual net computed in the same way it was computed both before and after 1939, 1940 and 1941 was not a market value, and hence it is proper to utilize the figures for other years in arriving at an estimate of damages.

In attempting to justify the use of figures for other years, however, appellants industriously ignore the fact that the use of such a yardstick is the exception, not the rule. Such evidence is permitted only where the nature of the wrong is such as to preclude more precise proof. (*Bigelow v. R.K.O. Radio Pictures, supra; Story Parchment Co. v. Paterson, supra; Eastman Kodak Co. v. Southern Materials Co.,* 273 U. S. 359.) As said in the *Bigelow* case:

> "The comparison of petitioners' receipts before and after respondents' unlawful action impinged on peti-

tioners' business afforded a sufficient basis for the jury's computation of the damage, where the respondents' wrongful action *had prevented petitioners from making any more precise proof of the amount of the damage."* (327 U. S. at p. 266.)

Under no rational theory may it be said here that precise proof of appellees' damages was *prevented* by any act of appellant. As heretofore pointed out, the single net figures were *stipulated* to; and it was therefore error for the District Court not to have used them in arriving at the respective amounts of damages awarded by it.

Conclusion.

It will be recalled that in appellant's opening brief (p. 14), the point was made that a determination by an appellate court that a complaint states a cause of action constitutes the law of the case only to the extent that the allegations thereof, deemed to be true on the former appeal, are substantiated by *proof.* This legal proposition is not controverted by appellees.

The refusal of the District Court to make a finding as to the issue of interstate effects stands as irrefutable evidence that appellees failed, *by proof,* to substantiate their allegations in this respect. It therefore follows that the pronouncements of the Supreme Court on the former appeal as to this subject do not constitute the law of the case, despite appellees' protestations to the contrary. The Court was there dealing only with facts *alleged;* and this is made doubly evident when, as we have seen, it said in the closing

portions of the opinion: *"The allegations comprehend all that we have set forth."* (334 U. S. at p. 244.)

We have taken neither the time nor the space to answer in detail the many assertions in appellees' brief with which we might well take issue. There are, however, one or two matters which warrant direct challenge.

In an attempt to impeach appellant's freight figures appellees assert that Clarksburg's 1939 production and sales dropped from those of 1938. This is incorrect. Clarksburg's production and sales for 1938 were, respectively, per 100-pound bags, 580,431 and 390,385; in 1939 they jumped to 848,706 and 816,561.* [Deft. Ex. C; and see discussion at R. 686.] There was thus no question of an increase of freight costs on decreased sales, as appellees would have the Court believe. (Appellees' Br. p. 56.)

At page 60 of the supplement to appellees' brief, and in connection with their discussion of hypothetical damages, another patently incorrect statement is made as regards the "carry-over" of sugar from one year to the next. It is there stated that the company received the entire benefit of any price increases in the carry-over year. The trial court did not so find, and the evidence is to the contrary. As the District Court itself pointed out:

> "The Court: As a matter of fact, under that system, on the crop he sold in 1939, would he not profit by increase in prices from 1938?
>
> The Witness: That is right, yes." [R. 667.]

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*The delivery figures referred to by counsel for appellees at R. 720 were northern California deliveries only. The over-all Clarksburg sales figures for the years in question are as we have set them out above.

For the reasons hereinabove given and for the reasons set forth in appellant's opening brief herein, it is respectfully urged that the portions of the judgment appealed from should be reversed.

Respectfully submitted,

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